WMC
WISCONSIN'S BUSINESS VOICE

May 5, 2008

Mr. Jon Heinrich
Bureau of Air Management
Wisconsin Department of Natural Resources
P.O. Box 7921
Madison, WI 53707
Jon.heinrich@wisconsin.gov

Re: AM-32-05: Revisions to Chapter NR 446 relating to Mercury, NOx and SO2 Emission Limitations.

Dear Jon:

Wisconsin Manufacturers & Commerce submits these comments on the Department of Natural Resources (DNR) proposed rule to limit mercury, nitrogen oxides (NOx) and sulfur dioxide (SO2) emissions. We appreciate this opportunity to provide input on this draft rule.

Wisconsin Manufacturers & Commerce (WMC) is a business trade organization with more than 4,300 members statewide in the manufacturing, energy, commercial and service sectors. Roughly one-quarter of the private sector employees in Wisconsin are employed by WMC members. WMC members have a substantial interest in this rule as we have utility members directly affected by the proposal and all other members will be indirectly, but substantially impacted by the higher electric rates resulting from this proposal.

WMC is alarmed that the continued layering of regulatory burdens on Wisconsin electric utilities is reaching a tipping point such that it will no longer be affordable to operate a business in Wisconsin in key energy-intensive manufacturing sectors. The Wisconsin Public Service Commission (PSC) conducted an analysis of industrial and residential electric rates in Wisconsin as part of its Strategic Energy Assessment in June 2006. This analysis shows that Wisconsin has lost its electric rate advantage over other Midwest states for both industrial and residential electricity users. This rate disparity relative to nearby states raises affordability issues for homeowners, and diminishes the competitiveness of our businesses.

Wisconsin businesses and homeowners will soon see exorbitant energy cost increases associated with recently promulgated CAIR and NOx RACT rules. The 2007 cost study discussed below projects $4.3 billion dollars just for the federal CAIR and the CAMR programs. This study understates the costs associated with CAIR in that DNRôs

rule exceeds the federal CAIR program in certain important aspects that increase costs for Wisconsinôs investor-owned utilities. These utilities serve key Wisconsin manufacturing industries who rely on affordable and reliable energy to compete against both domestic and foreign manufacturers.

Layering the additional costs associated with the mercury, nitrogen oxides (NOx) and sulfur dioxide (SO2) mandates contained in this proposed rule increases our competitive disadvantage by forcing Wisconsin employers to bear the financial burden of regulatory costs not borne by their competitors in other states and nations. Our concerns are magnified by the fact that the mercury regulations in this rule will result in little or no incremental public health benefit beyond our current regulatory framework, and the NOx and SO2 regulations are not needed for Wisconsin to meet the health-based ambient air quality standards for these pollutants. Indeed, the Department chose to advance what might be the most costly component of this proposed rule ï the NOx and SO2 requirements ï as a stealth mandate; violating virtually every fair notice provision in Chapter 227. Regrettably, DNR has moved forward with a very expensive rule with severe financial impacts on manufacturers and other electric ratepayers, without a meaningful environmental benefit or credible justification for doing so.

I. MULTI-POLLUTANT OPTION IS COSTLY, NOT NEEDED TO MEET AIR QUALITY STANDARDS AND INCONSISTENT WITH WISCONSIN LAW.

The multi-pollutant component of the proposed rule requires the affected EGUs to achieve nitrogen oxides (NOx) and sulfur dioxide (SO2) reductions. Under this ñoption,ò affected power plants must achieve a nitrogen oxides (NOx) emission standard of 0.07 pounds of NOx per million BTU and a sulfur dioxide (SO2) emission standard of 0.10 pounds of SO2 per million BTU by January 1, 2015. Owners and operators must designate which large units will follow the multi-pollutant option within 24 months after the effective date of the rule.

DNR readily acknowledges that these limits are beyond any mandates currently required by federal and state regulations. While framed as an *alternative*, anyone compelled to elect this option must still attain 90 percent mercury emission reduction standard. That is, the election buys time but is not an alternative to the 90 percent mercury mandate. Notably, should the 90 percent mercury emission requirement be technically infeasible under the proposed timelines, as many, the alternative multi-pollutant compliance option imposing NOx and SO2 mandates becomes the *only* compliance alternative. One study of comparable NOx and SO2 limitations found that the compliance costs could reach $700 million ***per year***.[1]

A. DNR Failed to Provide the Regulated Community Fair Notice of the Costly Ozone and PM2.5 Mandates Contained in the Proposed Rule.

[1] BBC Research and Consulting, ñProjected Impacts on the Midwestern Economy of Beyond CAIR SO2 Reductions for Regional Haze,ò May 23, 2007.

DNR asserts that this rule has been under development for years. However, the proposed NOx and SO2 mandates were first publicly unveiled in March 2008 with the release of this draft rule and its related documents. Given this is a mercury rule, one might fairly ask what these requirements have to do with mercury. The answer, as best as we can discern, is that these requirements have nothing whatsoever to do with mercury. Instead, DNR is using the mercury rule to disguise an improper attempt to reduce precursor emissions relating to ozone and particulate matter.

1. DNRôs Record is Silent on the NOx and SO2 Requirements. It is difficult to glean from the proposed rule record what is the purpose or genesis of the NOx and SO2 mandates. As discussed in detail below, key statutory requirements that were to include such information were simply ignored by DNR. ***The 2005 scope statement has absolutely no indication that the rule would target NOx and SO2 emissions***. The required fiscal analysis has no discussion of the severe fiscal impacts of the NOx and SO2 requirements. The various components of the rule analysis intended to provide the public needed information on the rule also was void of any information on the NOx and SO2 requirements. For example, the rule analysis had no comparison to federal or neighboring state NOx and SO2 programs; had no discussion of factual data and analytical methodologies and findings relating the proposed NOx and SO2 emission limits; and had no discussion of DNRôs statutory authority to impose the NOx and SO2 mandates.

Usually, memorandum to the Natural Resources Board accompanying draft rules would provide an indication of DNRôs intent behind such a significant proposal as the NOx and SO2 requirements set forth in this proposed rule. However, the March 6, 2007 memorandum to the Board requesting authorization for hearings on this rule is void of any discussion of these requirements. Likewise, the following August 15, 2007 briefing to the Board on the hearings for the 2007 mercury rule had details on mercury requirements and noted alternatives, but no mention that DNR was contemplating the imposition of severe NOx and SO2 mandates.

The lack of any required justification or other information on the NOx and SO2 requirements, clearly required under Wisconsin law, leaves the regulatory community in the untenable position of commenting on what amounts to a regulatory ghost. Yet, this costly proposal must be scrutinized as best as we can.

2. DNRôs NOx and SO2 Requirements are an Attempt to Address Ozone and Particulate Matter Pollution. In a fatal rulemaking defect discussed below, we only have extrinsic evidence of DNRôs intent behind this sweeping proposal. For example, DNRôs April 2008 *Air Matters* newsletter had an article on the EPAôs new ozone standard. This report noted that ñWisconsin and neighboring states have already adopted a number of new requirements to reduce ozone-causing emissions such as SOx (sulfur oxides) and NOx (nitrogen oxides). In addition, the state expects that the multi-pollutant option in its pending mercury rule for coal-fired power plants will also substantially reduce SOx and

NOx emissions.[2] As with past NOx mandates, the purpose the the NOx provisions in this rule appears to be to address ozone pollution.

More troubling was March 12, 2008 news report that suggested DNR is attempting to circumvent statutory restrictions that limit ozone mandates to legally designated nonattainment areas. In that article on the new EPA ozone standard, DNR management acknowledges the regulatory burdens facing Southeast Wisconsin counties suffering under the nonattainment designation and noted that the agency would ñtake steps so the (Southeast) region wouldnôt labor under different air regulations.ò[3] We can only assume that this state-wide mandate on ozone precursors ï the NOx mandate in this proposed rule ï was the ñstepsò being referenced.

In addition, a May 2, 2008 news article covered the American Lung Associationôs annual air quality report. The report gave a so-called ñDò grade for Dane County on particulate pollution. DNR management noted that the proposed ñmercuryò rule would alleviate this problem.[4] New NOx and SO2 mandates are often targeting the new federal standard for small particulate matter, or PM2.5. Also evidencing that a key goal for the NOx and SO2 mandates in this mercury rule was PM2.5 was a March 20, 2008 news article on Governor Doyleôs decision not to recommend PM2.5 nonattainment designations. In response to criticism by environmental groups it was reported that DNR management asserted ñDoyleôs proposed rule to cut mercury pollution 90% will spur faster complianceò with the new PM2.5 standard.[5]

It is our conclusion, then, that DNR intends to regulate NOx and SO2 emissions under this proposed rule with the duel purpose of addressing ozone and particulate matter pollution. Since they offered no rationale, the regulated community, and the businesses and homeowners paying for these reductions should expect DNR believes such reductions are necessary to meet existing federal air quality standards. However, we are not violating any such standard, nor is there any other legitimate reason to impose these costly mandates.

B. The NOx and SO2 Requirements are NOT Needed to Address Federal Ozone and PM2.5 Standards.

As discussed below, Wisconsin law generally requires that the DNR air quality programs be justified as necessary to meet federal air quality standards. Necessarily, then, the NOx and SO2 requirements must be shown by DNR as necessary to meet federal

---

[2] Wisconsin Department of Natural Resources, *Air Matters*. April 2008. http://www.dnr.state.wi.us/air/pubinfo/airmatters/200804.html.

[3] Berquist, Lee. ñOzone rules tightened by EPA; county still violates.ò *Milwaukee Journal Sentinel*, March 12, 2008. http://www.jsonline.com/story/index.aspx?id=727730.

[4] Seely, Ron. ñDane County's grade for particle pollution remains 'D' in annual air quality report.ò *Wisconsin State Journal*, May 2, 2008. http://www.madison.com/wsj/home/local/284322.

[5] Berquist, Lee. ñSubpar area air expected for years.ò *Milwaukee Journal Sentinel*, March 20, 2008. http://www.jsonline.com/story/index.aspx?id=730604.

standards for ozone and PM2.5, as precursors to those pollutants. As noted above, however, the record for this rulemaking is void of any rationale justifying the NOx and SO2 mandates. But it is clear, as the Doyle Administration and DNR acknowledge, there is no legitimate regulatory purpose supporting the NOx and SO2 requirements.

1. Wisconsin meets the 1997 and 2006 PM2.5 Standards without any New Mandates. The Clean Air Act requires EPA to set National Ambient Air Quality Standards (NAAQS) for six criteria pollutants, including particle pollution known as particulate matter or PM. The nation's air quality standards for particulate matter were first established in 1971 and were not significantly revised until 1987, when EPA changed the indicator of the standards to regulate inhalable particles at 10 micrometers in diameter (PM10). In 1997, EPA revised the PM standards, setting a new standard for fine particles (PM2.5). EPA issued official designations for the PM2.5 standard on December 17, 2004, and made modifications in April 2005. All Wisconsin counties are in compliance with the 1997 standard, and as such are designated as attaiment for the standard.[6]

EPA revised the air quality standards for particle pollution in 2006. The 2006 standards tighten the 24-hour fine particle standard from the current level of 65 micrograms per cubic meter (µg/m3) to 35 µg/m3. EPA expects designations based on 2007-2009 air quality data to take effect in 2010. In December of 2007, the Governors of each state were to recommend which counties would be designated nonattainment for the new 2006 standard. In a December 18, 2007 letter to EPA, Governor Doyle made such recommendations.[7] The Governor expressed some key conclusions relevant to the need for the NOx and SO2 requirements proposed in this rulemaking.

> The [scientific analysis made by DNR] demonstrates that Wisconsin will be attaining the standards for PM2.5 in 2015 without implementing any additional control programs beyond those already on the books. (2015 is the compliance deadline for the new PM2.5 standard.)
>
> In total, these [NOx RACT and CAIR] rules are estimated to reduce NOx emission in Wisconsin by more than 15,000 tons annually or more that 60% from 2003 levels. These critical rules build on Wisconsinôs existing regulations and control programs for sulfur dioxide and nitrous oxide emissions from industry and utilities, as well as the stateôs mobile source emission control programs for reformulated gasoline and vehicle inspection maintenance.
>
> Per the attached analysis, EPA and LADCO have concluded that Wisconsinôs current on the books regulations will result in compliance with the standard. Furthermore, the State has also promulgated additional significant regulations as part of the CAIR and NOx RACT Rules.

[6] EPA Final State Designations for the 1997 PM2.5 Standard. For Wisconsin, ñentire state is attainment/unclassifiable.ò http://www.epa.gov/pmdesignations/regions/region5desig.htm.

[7] Letter from Wisconsin Governor Doyle to EPA Region 5 Administrator Mary Gade regarding Designation of PM2.5 Nonattainment Areas in Wisconsin. December 18, 2007.

Clearly it is the position of Governor Doyle and DNR, supported by EPA and Lake Michigan Air Directors Consortium (LADCO) analysis, that on the books controls are sufficient to meet the new PM2.5 standard. The newly promulgated CAIR and NOx RACT rules add a significant margin of safety. ***The proposed NOx and SO2 requirements in this rule, therefore, are not needed to attain the new PM2.5 standard***.

2. Wisconsin will Attain the Existing Ozone Standard without any New Mandates. Based on air quality data for the years 2004-06, eight counties have met the federal health-based standard for ozone. Milwaukee, Ozaukee, Washington, Waukesha, Racine, Kenosha, Manitowoc and Kewaunee counties are eligible to be redesignated as ñattainment.ò This progress is the result of considerable reductions in ozone-forming emissions by Wisconsin manufacturers and utilities and marked an historic breakthrough in improved air quality.

Unfortunately, in what is expected to be an anomaly, the Kenosha monitor resulted in an exceedance in 2007. WMC believes, however, that the timely submittal for redesignation should control and result in the redesignation to attainment of the Southeastern Wisconsin counties. Regardless, DNR and LADCO have demonstrated that on the books controls will result in attainment of all counties by the compliance deadlines.[8] ***The proposed NOx and SO2 requirements in this rule, therefore, are not needed to attain the federal ozone standard***.

It should be noted that the new ozone standard has yet to come into play for the states and cannot yet justify any regulatory mandates. EPAôs revised standard was published in the *Federal Register* on March 27, 2008[9]. States must make recommendations to EPA by March 2009 for areas to be designated attainment, nonattainment and unclassifiable. Those recommendations will be based on 2006-08 monitoring data. States must submit State Implementation Plans outlining how they will reduce pollution to meet the standards by a date that EPA will establish in a separate rule. However, if EPA issues designations in 2010, an ambitious schedule, then these plans would be due in 2013. Even if the rule is not delayed by pending litigation, Wisconsinôs status is yet to be determined; and notably, any compliance plans are not required for at least five years.

Given the likelihood of improved air quality resulting from on-the-books controls such as CAIR, NOx RACT and federal mobile source standards, WMC does not believe the new ozone standard will result in additional Wisconsin counties being designated nonattainment. However, if additional counties are designated, air quality modeling and future ambient monitoring data will dictate whether additional pollution controls are warranted. The proposed mercury ruleôs blanket approach of enacting stringent emission

---

[8] Wisconsin DNR, Kevin Kessler, Regional Air Quality Workshop. October 10, 2007. http://www.ladco.org/Oct%202007%20Workshop/Wisconsin.pdf. New Regional Modeling Results, Michael Koerber, Lake Michigan Air Directors Consortium, October 10, 2007. http://www.ladco.org/Oct%202007%20Workshop/Oct%2010%20Modeling%20Presentation.pdf.

[9] Federal Register, Part II, Environmental Protection Agency, 40 CFR Parts 50 and 58.

limitations on a statewide basis, bearing no relationship to monitoring data or geographic attainment classifications, is unjustified and contrary to Wisconsin law. ***Thus, the new ozone standard cannot be the justification for the proposed NOx and SO2 requirements in this rule.***

C. The NOx and SO2 Requirements are Inconsistent with Statutory Requirement that DNR's Plans and Standards not exceed Federal Requirements.

WMC is discouraged that DNR is attempting to circumvent statutory requirements and longstanding policies pertaining to Wisconsin's implementation of federal air quality standards. WMC certainly shares DNR's apparent concern that certain areas in Southeastern Wisconsin may be designated nonattainment under the new ozone standard. But as noted above, it is premature to speculate when and where these new requirements will be imposed, much less what will be required to meet the new standard. In any event, Wisconsin statutes govern DNR's response to the current and pending standards.

It is an imperative policy embodied in our statutes that DNR may not exceed the requirements of the Clean Air Act when developing ozone and other air quality programs. These policies were reaffirmed by the Legislature and the Doyle Administration through negotiations and enactment of the Jobs Creation Act, 2003 Wis. Act 118. With respect to ozone, Wis. Stat. § 285.11(6) provides that DNR is to develop state implementation plans as *required* to meet federal air quality standards and that:

> ***The rules or control strategies*** submitted to the federal environmental protection agency under the federal clean air act for control of atmospheric ozone ***shall conform with the federal clean air act.***

A basic premise of this provision is that DNR may not impose ozone requirements in counties that are meeting the federal standard. Given that the nonattainment designations are years away, there are no requirements for any counties in the state under the new ozone standard, and more important, no areas are yet designated as nonattainment. It is disturbing that certain reports suggest that DNR is purposefully attempting to circumvent both state and federal law in this regard by using the mercury rule as a Trojan horse for NOx and SO2 regulations.

As noted in the above report, DNR management infers that the agency intends this proposed mercury rule to provide state-wide ozone controls as some sort of regulatory courtesy to expected ozone nonattainment areas. That is a tactic that has never proven effective as any sort of regulatory relief. Rather, state-wide ozone controls only broaden regulatory burdens; in this case, substantial rate increases on businesses and homeowners across the state. Furthermore, *DNR has not even attempted to justify whether statewide controls, especially those targeted in northern Wisconsin, will impact ambient air quality in regions with historic ozone nonattainment issues such as Southeast Wisconsin*. Our statutes and prior policies target regulatory controls to specific nonattainment areas for a reason; namely, regulating outside the borders of nonattainment counties often has little

or no benefit in terms of bringing those problem areas into compliance. Broad control schemes that ignore meteorological and pollution transport patterns simply add cost and make our manufacturers less competitive without addressing localized ambient air quality issues.

Consistent with the above report that DNR management believes state-wide ozone controls are a good idea is a recent even more disturbing assertion that the entire nonattainment/attainment designation protocols are to be ignored. In a March 1, 2008 news article, DNR management is quoted as saying that ñattainment and nonattainment units are an old and outdated artifact of the Clean Air Act.ò[10] Unfortunately, such a view evidences a total disregard of both federal and state law. We would assume this was an inaccurate quote except that this entire rulemaking effort is marked with a similar, near contempt of the laws governing administrative rulemaking and the Departmentôs authority to regulate air pollution.[11]

Another well settled policy wholly ignored in this rulemaking is that DNR will not impose regulatory burdens that are not necessary to meet federal standards. Again, this is a policy arising from Wisconsin statutes. Wis. Stat. § 285.21(1)(a) provides:

> *Similar to federal standard*. If an ambient air quality standard is promulgated under section 109 of the federal clean air act, the department shall promulgate by rule a similar standard but ***this standard may not be more restrictive than the federal standard*** except as provided under sub. (4).

DNR, LADCO and EPA all agree the Wisconsin is meeting the 1997 PM2.5 standard and, without any new mandates, will meet the new 2006 PM2.5 standard. Thus, the purpose of imposing the proposed NOx and SO2 requirements in this rule can only be justified as necessary to reach an ambient air concentration below those standards; in effect, establishing a standard that is more restrictive than the federal PM2.5 standard. ***Thus, the proposed NOx and SO2 requirements are more restrictive than any corresponding federal standard or program, making them inconsistent with Wisconsin law.***

II. THE MERCURY EMISSION PORTION OF THE PROPOSED RULE IS COSTLY, TECHNICALLY INFEASIBLE, AND INCONSISTENT WITH WISCONSIN STATUTORY REQUIREMENTS.

---

[10] Seely, Ron. ñDoyle: The airôs just fine,ò *Wisconsin State Journal,* March 1, 2008. http://www.madison.com/wsj/topstories/275159.

[11] In response to Governor Doyleôs recommendation to EPA that all counties be designated attainment for PM2.5, a recommendation that will likely be ignored by EPA as inconsistent with the Clean Air Act, the *Milwaukee Journal Sentinel* published an editorial titled ñFollow the law ï The state should abide by the federal Clean Air Act until the law changesò April 9, 2008. It is a sentiment that we wholly support despite the agreeable sentiments behind the Governorôs recommendation. http://www.jsonline.com/story/index.aspx?id=736936

Under the proposed rule, the stateôs large coal-fired power plants (those with a nameplate capacity of 150 Megawatts (MW) and greater) must achieve a 90 percent mercury emission reduction by 2015, or alternatively, achieve a 90 percent mercury emission reduction in 2021 in exchange for meeting very stringent NOx and SO2 controls by 2015. Small coal-fired power plants (greater than 25 MW but less than 150 MW) must reduce their mercury emissions to a level defined as Best Available Control Technology (BACT). These comments focus on the costs and legal issues relating to the 90 percent mercury reduction component of the rule.

A. DNR does not have the Requisite Statutory Authority in light of an Inadequate Health Risk Assessment and the Lack of Required Findings.

1. Wisconsin Law Requires DNR Choose the Most Cost Effective Alternative and Make Related Findings. Sections 111 and 112 of the federal Clean Air Act authorize EPA to establish emissions standards for certain air pollutants. Wisconsin law generally requires that, if the EPA promulgates air emissions standards under Sections 111 or 112, the DNR must adopt state air emission standards that are ***no more restrictive*** than the applicable federal standards. With respect to federal standards established under Section 111, Wis. Stat. § 285.27(1)(a) provides:

> If a standard of performance for new stationary sources is promulgated under section 111 of the federal clean air act, the department shall promulgate by rule a similar emission standard, including administrative requirements that are consistent with the federal administrative requirements, but this standard may not be more restrictive in terms of emission limitations than the federal standard except as provided under sub. (4).

Likewise, with respect to federal standards under Section 112, Wis. Stat. § 285.27(2)(a) provides:

> If an emission standard for a hazardous air contaminant is promulgated under section 112 of the federal clean air act, the department shall promulgate by rule a similar standard, including administrative requirements that are consistent with the federal administrative requirements, but this standard may not be more restrictive in terms of emission limitations than the federal standard except as provided under sub. (4).

In the absence of federal standards established under Section 111 and 112, the DNR may not promulgate a state emission standard unless the agency finds that the standard is needed to provide adequate protection for public health or welfare. Wis. Stat. § 285.27(1)(b) and (2)(b). With respect to hazardous air pollutants not subject to regulation under Section 112, § 285.27(2)(b) requires certain additional findings:

> If an emission standard for a hazardous air contaminant is not promulgated under section 112 of the federal clean air act, the department may promulgate an emission standard for the hazardous air contaminant if the department finds the standard is needed to provide adequate protection for public health or welfare. The department may not make this finding for a hazardous air contaminant unless the finding is supported with written documentation that includes all of the following:
>
> 1. A public health risk assessment that characterizes the types of stationary sources in this state that are known to emit the hazardous air contaminant and the population groups that are potentially at risk from the emissions.
> 2. An analysis showing that members of population groups are subjected to levels of the hazardous air contaminant that are above recognized environmental health standards or will be subjected to those levels if the department fails to promulgate the proposed emission standard for the hazardous air contaminant.
> 3. An evaluation of options for managing the risks caused by the hazardous air contaminant considering risks, costs, economic impacts, feasibility, energy, safety, and other relevant factors, and a finding that the chosen compliance alternative reduces risks in the most cost-effective manner practicable.
> 4. A comparison of the emission standards for hazardous air contaminants in this state to hazardous air contaminant standards in Illinois, Indiana, Michigan, Minnesota, and Ohio.

In addition, Wis. Stat. § 285.27(1)(d) precludes DNR from regulating sources subject to emission limits under Section 112 of the Clean Air Act by making any state limits inapplicable:

> *Emissions regulated under federal law.* Emissions limitations promulgated under par. (b) and related control requirements do not apply to hazardous air contaminants emitted by emissions units, operations, or activities that are regulated by an emission standard promulgated under section 112 of the federal clean air act, including a hazardous air contaminant that is regulated under section 112 of the federal clean air act by virtue of regulation of another substance as a surrogate for the hazardous air contaminant or by virtue of regulation of a species or category of hazardous air contaminants that includes the hazardous air contaminant.

DNR acknowledges that the above provisions requiring a health risk assessment dictates its statutory authority with respect to this rulemaking.[12] Moreover, DNR concedes that whatever it does with respect this rulemaking, it will be superseded by the pending EPA program by virtue of the February 8, 2008 decision by the Washington

[12] See Explanation of Agency Authorization, DNR Proposed Rule Analysis.

D.C. Court of Appeals directing the EPA to promulgate MACT standards for utility mercury emissions under Section 112.[13] The DNRôs proposed rulemaking is in effect a temporary bridge between DNRôs existing mercury control program and the pending federal mercury program. As such, this rule must be shown to be a cost-effective, interim mercury program that reconciles any anticipated federal program promulgated under Section 112 of the Clean Air Act.

2. DNR Failed to Compare its Proposed Rule with the Most Obvious Alternatives; the Existing DNR Mercury Rule and EPAôs CAMR. In an effort to comply with the health risk assessment requirement, DNR published a preliminary health risk assessment with related proposed findings. WMC asserts that this assessment is wholly inadequate and that DNR can not possibly make the required findings based on such assessment. Moreover, DNR has for several of the components simply failed to undertake the required analysis.

As noted above, Wis. Stat. § 285.27(2)(b)3 requires an evaluation of options for managing the risks caused by the hazardous air contaminant considering risks, costs, economic impacts, feasibility, energy, safety, and other relevant factors, and ***a finding that the chosen compliance alternative reduces risks in the most cost-effective manner practicable***. (Emphasis added) Any reasonable interpretation for using the terms ñalternativeò and ñmostò in conjunction with cost effective is that DNR would compare its proposed approach to other viable mercury control options; that is, ñalternativeò means an examination of multiple options. DNRôs health risk assessment, however, does not even attempt to compare the cost-effectiveness of this proposal with known, viable alternatives. The most obvious alternatives not evaluated are the existing DNR mercury rules and the overall emission reduction levels found in CAMR.

In 2004, DNR promulgated a rule to reduce mercury emissions from coal-fired boilers operated by major electric generating facilities in Wisconsin (the ñ2004 Ruleò). Wisconsin DNR began developing this mercury regulation in December 2000. According to DNR, ñafter a lengthy and intense stakeholder process, including hearings and advisory groups, the Natural Resources Board, whose seven governor-appointed members set policy for the DNR, adopted regulations in June 2003.ò[14] The legislature reviewed and further modified the regulations, which took effect October 1, 2004.

The 2004 Rule requires the stateôs four major utilities to reduce their mercury emissions in two phases: a 40 percent reduction by 2010, and a 75 percent reduction by 2015. The rule also establishes a goal of 80 percent reduction by 2018 to encourage additional progress. Collectively, the stateôs four utilities operate 42 coal-fired boilers. Wisconsinôs rule does not require a specific control technology. Instead, DNR found it was ñmost cost effectiveò to allow each utility to select the best approach in light of its

[13] Id.
[14] DNR Factsheet: Wisconsin Regulations for Controlling Mercury Emissions from Electric Utilities, February 2005. http://dnr.wi.gov/air/pdf/AM3612005.pdf.

system needs. DNR determined that the total cost for the four major utilities in the state to meet the 80 percent goal is estimated to be $100 million annually.

DNR even noted that the 2004 Rule ñcontains several important provisions to protect electric reliability and ensure that the reductions required remain appropriate throughout rule implementation.ò DNR states that ñthe compliance schedule is extensive and includes over 10 years before final reductions need to be achieved. This allows ample time for planning and implementation of effective mercury reduction approaches.ò[15] According to DNR, the 2004 rule requirements ñwill be examined at three distinct periods during their 12-year life ***to ensure that requirements are cost-effective and achievable***. If not, adjustments will be made.ò[16] (Emphasis ours)

Despite the fact DNR established the 2004 Rule after years of deliberation, with significant public input, and the fact its governing board and the Legislature provides oversight and approval, DNR is now, after only a couple of years, simply walking away from the rule. Notably, the rule was found at the time to be cost-effective, and more importantly, provisions were in place to assure it remained cost-effective throughout its 12-year compliance period.

Rather than comparing the feasibility and cost-effectiveness of the 2004 Rule to this proposal, DNR merely asserts in its health risk assessment that the regulation of coal-fired electric generating units is cost-effective. Conspicuously, DNR found that to be the case for the 2004 Rule. This is hardly the robust analysis that should be undertaken to justify such a sweeping regulatory scheme.

3. DNR made no Finding of Need to abandon the 2004 Rule. In addition to the lack of any comparison and related cost-effectiveness analysis of the two alternatives, we consider it fatal to this proposal that DNR made no finding or undertook any analysis that discarding the 2004 Rule was ñneeded to provide adequate protection for public health or welfare.ò To the contrary, DNR itself makes the point that this rulemaking was never predicated on a finding of need. In the Notice of Public Hearing for this rule, DNR states:

> ***The Department is proceeding with this rulemaking to address Governor Doyle's August 25, 2006, directive to the Department to develop a rule achieving a 90% reduction of mercury emissions from coal-fired power plants.*** (Emphasis added)

Despite the Governorôs political directive to promulgate a 90 percent rule, a finding of need remains the fundamental condition for the required statutory authority to promulgate the proposed mercury regulations. It is our position, as discussed below, that such a finding was not made in the context of this proposal because it would be unsupportable. In any event, DNR has acknowledged the genesis of this proposed rule is simply *following orders* from the Governor, rather than undertaking any legitimate assessment or finding of need.

---

[15] Id.
[16] Id.

B. EPA's Analysis finding CAMR most Cost-effective Supports a Conclusion DNR's Proposed Rule is Not the Most Cost-effective.

The March 8, 2008 decision of the D.C. Circuit which ultimately vacated EPAôs CAMR related to a procedural defect in the manner in which the EPA delisted electric utilities as a source category under Section 112 of the Clean Air Act, which has implications on whether the use of a cap and trade mechanism versus a technology-based MACT standard is the appropriate means to regulate. The court did not evaluate the related factual underpinnings of CAMR which are relevant to DNRôs regulatory authority under Wisconsin law. Thus, EPAôs findings with respect to CAMR remain relevant to this rulemaking because DNR has the statutory authority to set mercury reduction levels consistent with the model CAMR rule unless and until EPA promulgates mercury regulation under Section 112.

1. DNR and Wisconsin Statutory Provisions Recognize a Deference afforded EPA. At the time the 2004 Rule was promulgated, EPA had not promulgated a federal standard for the emission of mercury. However, the 2004 Rule included a requirement that the DNR revise the state mercury standards to be consistent with any federal mercury standards thereafter established. Wis. Admin. Code § NR 446.029 provides:

> If a federal emission standard limiting mercury emissions from a major utility is promulgated under section 111 or 112 of the federal Clean Air Act (42 USC 7411 or 7412), the department shall adopt a similar standard, including administrative requirements that are consistent with the federal administrative requirements. The standard adopted by the department may not be more restrictive in terms of emission limitations than the federal standard. The administrative requirements of the standard adopted by the department relating to baseline calculations, monitoring, recordkeeping and reporting shall be the same as the federal standard. No later than 18 months after the promulgation of a federal emission standard limiting mercury emissions from a major utility, the department shall revise this subchapter under the provisions of s. 227.10 or 227.24, Stats., as appropriate, to comply with the provisions of this section and s. NR 446.06 (4).

As noted above, § 285.27 affords a deference to the analysis conducted by the EPA by significantly limiting the DNRôs statutory authority to regulate a hazardous air contaminant subject to federal clean air act regulation. Wisconsin law is clear on the relevancy of EPAôs framework for regulating pollutants like mercury, and necessarily, deference is afforded thereto. Yet the required health risk assessment incorrectly failed to even consider the EPAôs approach, contrary to the statutory requirements of § 285.27(2)(b)3.

2. EPA Concludes that Reductions beyond CAMR are not needed and that 90 Percent by 2015 is not Feasible. In promulgating the mercury emission limitations in the federal CAMR rule EPA published extensive regulatory finding with respect to the

control of mercury emissions from electric utilities. These findings are based upon the expert judgment of EPA regulators, and are relevant to the DNRôs required health risk assessment. Some of EPAôs relevant findings with respect to CAMR include:

- [W]e conclude today that the level of Hg emissions remaining after imposition of the requirements of the [Clean Air] Act will not cause hazards to public health.[17]
- [W]e demonstrate that the CAMR rule, once implemented, will result in levels of Hg emissions from coal-fired Utility Units that pose no hazards to public health[18]ò
- Our analysis concludes that Utility Unit Hg emissions do not cause hazards to the health of the general public or higher fish consuming recreational anglers.[19]
- EPA concludes that the level of Hg emissions remaining after implementation of CAIR, and independently, CAMR, which implement sections 110(a)(2)(D) and 111, respectively, do not result in hazards to public health.[20]
- EPA in its expert judgment, concludes that utility Hg emissions do not pose hazards to public health, and therefore that it is not appropriate to regulate such emissions under section 112.[21]
- [T]he Agency has concluded that power plant Hg emissions remaining after CAIR, and even more so after CAMR, do not pose hazards to public health.[22]
- CAIR and CAMR reduce the publicôs methylmercury exposure due to fish consumption to below the methylmercury [reference dose]é [23] [*Note: The EPA reference dose is defined as the amount of mercury a person, including sensitive subpopulations, can be exposed to on a daily basis over a lifetime without appreciable risk of effects, and is 1 microgram per kg of body weight, or 2.3 times as stringent as the level set by the World Health Organization (WHO) as being protective of human health]*
- The final CAMR will not lead to localized ñutility hot spots.ò[24]
- Based on what we know about the uncertainties and nature of the potential adverse effects associated with Hg exposure, the extent to which the public,

[17] Excerpts from EPAôs Revised Mercury Regulatory Finding,.70 Fed. Reg. 15994, pp. 16022, March 29, 2005.

[18] Id at pp. 16029.

[19] Id. at pp. 16022.

[20] Id. at pp. 16022.

[21] Id. at pp. 16025

[22] Id. at pp. 16025

[23] Id at pp. 16023

[24] Id. at pp. 16025

including sensitive subpopulations, is exposed to Hg, and the extent to which such exposure could be reduced by further reducing Hg emissions from U.S. power plants, ***we have concluded that the cost of requiring further reductions in Hg emissions from power plants would significantly outweigh any benefits***.[25] (emphasis added)

These findings were front and center before DNR, but they were never evaluated in its health risk assessment. Any reasonable assessment of alternatives should have at least noted why DNR rejected these conclusion *en masse.*

C. There are No Environmental or Health Benefits Associated with the 90 Percent Mandate and an Emission Trading Ban.

The fundamental question presented is whether the DNR proposed rule is cost-effective and whether it produces any meaningful benefits. Here the benefits sought are reductions of mercury deposition into Wisconsinôs lakes and rivers, and subsequently, reducing fish consumption health concerns. To be meaningful, those reductions would have to measurably reduce mercury in fish to levels that create health benefits for Wisconsin citizens. DNR has provided no evidence to support such a finding that would support imposing $450 million in additional costs to be borne by Wisconsin businesses and homeowners through higher electric rates. Notably, DNR fails to make a finding that the proposed rule will result in the elimination of any Wisconsin fish consumption advisories, despite noting the advisories as a basis for regulating utility mercury emissions.

United States mercury emissions make up about 6 percent of the world total. Relevant here is that U.S. utility mercury emissions make up less than 2 percent of the world total. Asia is responsible for roughly half of mercury emitted globally per year, with much of this being deposited across the United States due to prevailing west-to-east winds.[26] Asiaôs economic growth is causing an increasing percentage of mercury in the U.S.

Wisconsin utilities prepared a response to the January 22, 2007 petition from various environmental and fishing groups asking for deeper mercury reduction mandates.[27] In that response, the following points were made relating to the efficacy of DNRôs 90 percent requirement and its ban on emission trading:

- The distance mercury travels from utility sources is related to the form emitted. There are two primary forms of mercury emitted from power plants: elemental mercury and oxidized mercury. Elemental mercury tends to enter the global mercury pool. About 20 percent of oxidized mercury can be deposited within 30 kilometers of its origin, with the remainder being converted into elemental mercury.

[25] Id at pp. 16025
[26] EPRI, Integrated Approaches to Managing Mercury at 1 (September 2006).
[27] Wisconsin Utilitiesô Response to Citizensô Mercury Petition (June 2007).

- EPA conducted a mercury modeling study in the mid-1990s as part of its comprehensive Mercury Study Report to Congress.[28] This study estimated that less than seven percent of mercury emissions from large coal-fired units is deposited within 50 km of the facility.
- As part of the development of CAMR, EPA conducted additional utility mercury modeling.[29] This modeling showed that all coal-fired power plants in the U.S. contributed less than 10 percent to mercury deposition occurring in Wisconsin.
- The atmospheric models mentioned above used to generate these estimates of source attribution for mercury tend to overestimate contributions from point sources, such as coal-fired power plants. Therefore, all model predictions of "local" impacts on deposition are likely to be conservative.[30]
- In January 2002, LADCO released the results of its Midwest mercury study and found that utility sources in Wisconsin contribute one to five percent of the simulated wet deposition as measured at the four Wisconsin Mercury Deposition Network (MDN) monitors.[31]
- In May 2002, a study developed in cooperation with EPRI and conducted by Atmospheric and Environmental Research, Inc. found that mercury deposition declines by one to four percent over most of the state when Wisconsin utility emissions are completely eliminated.[32]

Again, DNR had all of this information as part of comments on the 2007 rule proposal. A reasonable assessment of the above noted studies leads to a conclusion that this rule does nothing to appreciably reduce the noted risks DNR states are of concern; that is, Wisconsin utility mercury emissions are inconsequential and that the additional reductions imposed by this rule, while very costly, do nothing to reduce Wisconsin fish advisories.

D. DNR Fails to Link Wisconsin Utility Emissions to Population Groups that would see Heighten Risks if the Proposed Rule is not Promulgated.

As noted above, Wis. Stat. § 285.27(2)(b)1 and 2 prohibits DNR from making a finding that this rule is needed unless the finding is supported by written documentation that addresses the following:

---

[28] EPA, 1997. Mercury Study Report to Congress, Volume III: Fate and Transport of Mercury in the Environment, EPA-452/R-97-005, U.S. Environmental Protection Agency, Washington, D.C.
[29] US EPA, 2005. Chapter 8, Regulatory Impact Analysis of the Clean Air Mercury Report. Report # EPA-452/R-05-003.
[30] Seigneur, C., K. Lohman, K. Vijayaraghavan, J. Jansen and L. Levin, 2006. Modeling atmospheric mercury deposition in the vicinity of power plants, *J. Air Waste Manage. Assoc*., **56**, 743-751.
[31] ICF Consulting, 2002. Application of the REMSAD Modeling System to the Midwest, Memorandum to LADCO, San Rafael, California.
[32] Vijayaraghavan, K., K. Lohman, P. Karamchandani and C. Seigneur, 2002. Modeling Deposition of Atmospheric Mercury in Wisconsin, Report CP136-02-1 to the Electric Power Research Institute (EPRI), Palo Alto, CA.

- Characterizes the types of stationary sources in this state that are known to emit the hazardous air contaminant.
- Identifies the population groups that are potentially at risk from the emissions from these sources.
- Shows that members of population groups are subjected to levels of the hazardous air contaminant that are above recognized environmental health standards or will be subjected to those levels if DNR fails to promulgate the proposed emission standard for the hazardous air contaminant.

The first task is rather straight forward and DNR has identified in its preliminary health risk assessment coal-fired electrical generating units as sources in Wisconsin that are known to emit mercury. The second undertaking is to link those sources to population groups at risk from the identified sources; namely, those EGUs targeted by this rule. DNR failed to make any logical connection between sources and receptor population groups.

Under its analysis of ñpopulation groups that are potentially at risk from mercury exposure,ò DNR merely notes the known groups most susceptible to mercury risk; that is, women, infants and children. There is no effort by DNR to link these population groups to emissions from those sources regulated under this proposal. Again, the legislative history of these provisions is instructive. With respect to the linkage between sources and population groups, the lead author of the Jobs Creation Act notes the flaw these provisions were intending to address in the billôs drafting instructions.

> Although DNR made the requisite ñfindingò [under prior law] that the regulation of these additional substances was need[ed], they did not undertake any analysis that the substances posed any actual environmental or health risks. Thus, the benefits were never quantified.[33]

It was the intent of the Legislature that this provision requires DNR to link emission sources to a risk that would be reduced if the rule advanced. As noted above, the DNR has not shown any increased risk to anyone in Wisconsin if this rule is not promulgated. Certainly, DNR failed to find the last component requires DNR to show those identified groups, noted by DNR as generally at risk, ñare subjected to levels of the hazardous air contaminant that are above recognized environmental health standards or will be subjected to those levels if DNR fails to promulgate the proposed emission standard.ò

In summary, as required by Wis. Stats. 285.27 (2)(b), the DNRôs risk assessment does not substantiate that the proposed regulation is needed to provide adequate protection for public health or welfare, nor does it provide an analysis showing that

[33] September 25, 2003 email from Sen. Steppôs office to Steve Miller (LRB) with ñattached proposalò including attached ñdocument describing the omnibus draft.ò pp. 11-14.

failing to promulgate the proposed emission standard will cause population groups to be subjected to levels of mercury that are above recognized environmental health standards. Notably, the DNR assessment does not evidence any documented connection between Wisconsin utility mercury emissions and mercury deposition in Wisconsin. Nor does the finding provide a credible risk analysis or explain how the proposed rule will reduce health risks to Wisconsin citizens. In essence, and as noted by DNR, the ñneedò for this rule is the need to implement the Governorôs edict to prepare a 90 percent mercury emission program, and a mountain of credible evidence from the experts at the EPA on the cost-effectiveness of CAMR as an alternative has been ignored.

E. 90 Percent Mandate and Emission Trading Ban will Increase Costs over Two-Fold or by $450 Million beyond CAMR.

1. DNRôs Proposed Rule Substantially Deviates from the 2004 DNR Rule and EPAôs CAMR**.** The DNR proposed rule generally requires large EGU sources to reduce emissions by 90 percent. We estimate this requirement imposes roughly a 20 percent reduction beyond the existing state rule or CAMR. A critical part of the cost-effective analysis required by Wis. Stat § 285.27 (2)(b) is assessing costs associated with the incremental reductions required under this rule. Of course, this analysis also requires that some benefits inure to those DNR expects would see lower mercury exposure through fish consummation. As noted, DNR failed to show any such benefit.

2. The Proposed 90 Percent Mercury Limits will Cost $450 Million**.** WMC is again assessing the incremental costs associated with DNRôs provisions that exceed CAMR requirements using the *Evaluation of the Compliance Implications to Wisconsin Electric Generators of Meeting the Wisconsin Proposed Mercury Rule*.[34] This June 2007 report was develop in coordination with WMC and the Wisconsin Utility Association on behalf of Center for Energy and Economic Development (CEED Report). We acknowledge that certain assumptions, particularly associated with differing timelines, may have shifted, so these estimates should be use with that in mind and as a placeholder for a more deliberative fiscal analysis we still hope to obtain through an economic impact report.

The CEED Study analyzed and presented the cumulative annualized compliance costs to Wisconsin utilities in meeting EPAôs Clean Air Interstate Rule (CAIR) and CAMR and the incremental costs with the Wisconsin mercury rule. The table below shows cumulative annualized compliance costs to Wisconsin generators between 2009 and 2020 to meet CAIR/CAMR are projected to be almost $4.3 billion. Under DNRôs proposed mercury rule, these compliance costs are projected to be almost $4.8 billion for the same 2009 to 2020 time period. ***Thus, the proposed 2007 DNR rule would have increased the cost of operating coal-fired generation facilities in Wisconsin by $450***

[34] Evaluation of the Compliance Implications to Wisconsin Electric Generators of Meeting The Wisconsin Proposed Mercury Rule; Prepared for Center for Energy and Economic Development; Prepared by James Marchetti, J. Edward Cichanowicz, Michael Hein (June 2007).

million between 2010 and 2020, or more than two times more expensive than CAMR.

CUMULATIVE ANNUALIZED COMPLIANCE COSTS - 2009-2020 (2006 $)				
Rules	**SO2**	**NOx**	**Mercury**	**Total Costs**
CAIR/CAMR	3,017,000,000	988,000,000	319,000,000	4,334,000,000
CAIR/WI Hg Rule	3,017,000,000	988,000,000	769,000,000	4,784,000,000
Differential Costs	**0**	**0**	**450,000,000**	**450,000,000**

Beyond the additional reductions, the more restrictive trading regime has a particularly acute impact on costs. The study found that under CAMR, because it allows for inter- and intra-state trading and flexibility, Wisconsin utilities could install less expensive technology on 70 percent of its current coal-fired capacity by 2020, with removal costs ranging between $12,000 and $57,000 per pound. However, under the 2007 proposed DNR rule, all of the stateôs 31 current coal-fired generating units would have to install some type of mercury control technology. DNRôs limits on trading under this proposed rule would also spike costs.

We acknowledge the difficulty in estimating costs when it is unclear whether the proposed emission limitation can even be met. It is evident, however, that the incremental costs are substantial when attempting to achieve 90 percent reduction. We are also convinced that DNR under estimated the cost. The bottom line is that given the inability to quantify benefits, DNR cannot find this proposed regulatory regime is cost-effective, which is required under Wis. Stat § 285.27 (2)(b).

III. THE PROPOSAL VIOLATES ADMINISTRATIVE RULEMAKING REQUIREMENTS INTENDED TO PROVIDE FAIR NOTICE TO THE REGULATED COMMUNITY AND THE PUBLIC.

A. DNR did not provide Required Analysis of the Underlying Rationale behind the NOx and SO2 Mandates.

As noted above, key statutory rulemaking requirements were ignored by DNR. The 2005 scope statement contains absolutely no indication that the rule would target NOx and SO2 emissions. The required fiscal analysis has no discussion of the severe fiscal impacts of the NOx and SO2 requirements. The various components of the rule analysis intended to provide the public needed information on the rule also was void of any information on the NOx and SO2 requirements. These fundamental violations of statutory rulemaking provisions include the following:

1. The 2005 scope statement required under Wis. Stat § 227.135 has no indication that the rule is targeting NOx and SO2 emissions.

2. The plain language analysis of the rule required under Wis. Stat. § 227.14(2)(a) merely notes the NOx and SO2 requirements in a couple of sentences and provides no clue as to their purpose.
3. The explanation of DNRôs statutory authority required under Wis. Stat. § 227.14(2)(a)1 has no discussion of DNRôs authority to set the proposed limits on NOx and SO2 emissions.
4. The summary of and comparison to any existing or proposed federal regulation required under Wis. Stat. § 227.14(2)(a)3 makes no such comparison to the various federal programs regulating NOx and SO2 emissions.
5. The comparison to similar rules in Illinois, Iowa, Michigan, and Minnesota required under Wis. Stat. § 227.14(2)(a)4 makes no such comparison of the various programs in those states regulating NOx and SO2 emissions.
6. The summary of the factual data and analytical methodologies that DNR used in support of the proposed rule and how any related findings support the regulatory approach chosen for the proposed rule required under Wis. Stat. § 227.14(2)(a)5 is silent on why or how the proposed NOx and SO2 limits were established.
7. The fiscal analysis required under Wis. Stat. § 227.14(4) has no discussion of the fiscal implications of the NOx and SO2 requirements.

Usually, memorandum to the Natural Resources Board accompanying draft rules would provide an indication of DNRôs intent behind such a significant proposal as the NOx and SO2 requirements set forth in this proposed rule. However, the March 6, 2007 memorandum to the Board requesting authorization for hearings on this rule is void of any discussion of these requirements.[35] Likewise, the July 18 and August 15, 2007 briefings to the Board provide a wide array of information on mercury programs, but no mention that DNR was contemplating the imposition of severe NOx and SO2 mandates.[36] Prior presentations to the Natural Resources Board and the Clean Air Act Advisory Committee also provide no indication of DNRôs intent to regulate NOx and SO2 emissions under this so-called mercury rule.[37]

B. DNR Never Prepared the Necessary Scope Statement on the Rule.

The earliest and most damaging deficiency in this rulemaking effort was the 2005 scope statement that DNR asserts provides the public the required information for this rulemaking. Wis. Stat. § 227.135(1) states:

---

[35] Background memo from Secretary Hassett to the Natural Resources Board, March 6, 2007. http://dnr.wi.gov/air/pdf/March07greensheetbgrdmemoAM3205.pdf.

[36] Presentations provided to the Natural Resources Board, July 18, 2007, at an informational seminar on mercury in Stevens Point, Wisconsin. http://dnr.wi.gov/air/toxics/mercury/nrbseminar.html. Presentation provided to the Natural Resources Board on August 15, 2007, at their meeting in Bayfield, Wisconsin. http://dnr.wi.gov/air/pdf/HgrulecommentsNRB0807.pdf.

[37] See, for example, DNR presentation to the Natural Resources Board on the Clean Air Mercury Rule - January 24, 2007. http://dnr.wi.gov/air/pdf/camrpres0701.pdf. Presentation to the Clean Air Act Task Force, December 15, 2006. http://dnr.wi.gov/air/pdf/hg1206caatf.pdf.

An agency shall prepare a statement of the scope of any rule that it plans to promulgate. The statement shall include all of the following:

(a) A description of the objective of the rule.

(b) A description of existing policies relevant to the rule and of new policies proposed to be included in the rule and an analysis of policy alternatives.

(c) The statutory authority for the rule.

(d) Estimates of the amount of time that state employees will spend to develop the rule and of other resources necessary to develop the rule.

(e) A description of all of the entities that may be affected by the rule.

(f) A summary and preliminary comparison of any existing or proposed federal regulation that is intended to address the activities to be regulated by the rule.

1. DNRôs Proposed Mercury Rule does not ñMirrorò the Federal Program. In 2004, DNR promulgated a rule to reduce mercury emissions from coal-fired boilers operated by major electric generating facilities in Wisconsin (the ñ2004 Ruleò). At the time the 2004 Rule was promulgated, EPA had not promulgated a federal standard for the emission of mercury. The 2004 Rule included a requirement that the DNR revise the state mercury standards to be consistent with any federal mercury standards thereafter established.

In May 2005, USEPA promulgated the federal Clean Air Mercury Rule (ñCAMRò) that established federal emissions standards for mercury under Section 111 of the Clean Air Act. The state emissions standards for mercury promulgated in the 2004 Rule were inconsistent with the federal standards under CAMR. Therefore, in order to comply with Wis. Admin. Code NR 446.029, DNR, in June 2005, initiated a new rulemaking proceeding to revise the state mercury standard to be consistent with CAMR.

Pursuant to Wis. Stat. § 227.135, DNR published a scope statement in June 2005 that states in part:

> On May 18, 2005, the federal Clean Air Mercury Rule (CAMR) was promulgated. This rule establishes mercury control requirements for new and existing coal-fired utility boilers. The rule sets a declining cap on mercury emissions in two distinct phases, 2010 and 2018, for each state. A national trading program has been developed as an option for states to achieve their mercury emission cap. New sources (those that commence construction after January 30, 2004) must meet a standard of performance (pounds of mercury per megawatt-hour) and any mercury emissions from these new sources must also be accommodated under the state mercury cap.
>
> * * *

> The state mercury rule in Chapter NR 446 has different mercury emission reductions and compliance determination requirements. ***The purpose of this action is to revise the state rule to mirror the federal CAMR requirements.*** (Emphasis supplied.)

The rulemaking proceeding initiated with the 2005 scope statement was never completed and the administrative rule contemplated by the scope statement was never promulgated.

On August 25, 2006, Governor Doyle announced that he had directed the DNR to develop a rule achieving a 90 percent reduction of mercury emission from coal-fired power plants through new rules. On or about January 22, 2007, a group of citizens filed a petition with the DNR pursuant to Wis. Stat. § 227.12 requesting initiation of a rulemaking proceeding to adopt new rules that would require a 90 percent or greater reduction in mercury emissions to the air. Although the DNR proposed new rules addressing mercury emissions in 2007 in response to the Governorôs directive and the citizen petition, DNR neither prepared nor published a scope statement for the new rules.

In comments submitted in response to the rules proposed in 2007, WMC advised DNR that its failure to publish a scope statement violated Wis. Stat. § 227.135 and denied them an opportunity to request an economic impact report pursuant to Wis. Stat. § 227.137.

On February 8, 2008, the United States Court of Appeals for the District of Columbia issued a decision that vacated the CAMR. Consequently, under Wis. Admin. Code § NR 446.029, it was no longer necessary that DNR revise the state mercury standards that had been promulgated in the 2004 Rule in order to render them consistent with the federal standard, as there no longer was a federal standard. Nevertheless, on February 29, 2008, DNR issued a ñNotice of Public Hearingò in which it announced that it would conduct a public hearing regarding proposed revisions to the state mercury standards in Wis. Admin. Code Ch. NR 446. On the same date, the DNR released a copy of this proposed rule and a related fiscal estimate.

The emissions standard for mercury in this proposed rule are materially different in scope, including emission limits and compliance options, from either the federal standard for mercury in CAMR or the state standard for mercury established by the 2004 Rule.

2. <u>The Scope Statement had no Reference to the NOx and SO2 Requirements.</u> As discussed above, this rule sets new state emissions standards for nitrogen oxide and sulfur dioxide. The 2005 scope statement did not address these pollutants, which is a fundamental defect relating to the scope statement statutory requirements.

1. DNR failed to describe that one of the key objectives of the rule was to regulate NOx and SO2 emissions as required under Wis. Stat. § 227.135(1)(a).

2. DNR failed to describe existing ozone and particulate matter policies relevant to this rule and of new policies relating to NOx and SO2 emissions as required under Wis. Stat. § 227.135(1)(b).

3. DNR failed to describe its statutory authority for NOx and SO2 requirements in this rule as required under Wis. Stat. § 227.135(1)(c).

4. DNR failed to include a summary and comparison of existing and proposed federal regulation pertaining to ozone, particulate matter and NOx and SO2 emissions as required under Wis. Stat. § 227.135(1)(f).

3. The Natural Resources Board has not approved nor has DNR published a scope statement on this rule. Wis. Stat. §227.135 requires that the Natural Resources Board approve a scope statement concerning this rule and DNR was required to publish a scope statement in connection with this rule. This never occurred, both of which are required by Wis. Stat. § 227.135. Unless and until DNR meets these obligations, § 227.135(3) expressly directs that DNR staff ñmay not perform any activity in connection with drafting the proposed rule except for any activity necessary to prepare the statement of the scope of the proposed rule.ò

The Wis. Stat. § 227.135(1)(a) requirement that a scope statement provide a description of the objective of the rule was clearly not met by the 2005 scope statement. The objective of this proposed rule is wholly different from the 2005 scope statementôs stated objective. The 2005 scope statement advised the public that ñthe purpose of [the proposed rulemaking] is to revise the state [mercury emission] rule to mirror the federal CAMR requirements.ò This proposed rule does not purport to implement any federal standard or directive, let alone CAMR. Instead, the objective of this proposed rule is to establish new state standards for mercury emissions because currently there is no federal standard. In addition, this proposed rule seeks to establish emission standards for two pollutants ð nitrogen oxide and sulfur dioxide ð that were not referenced in the 2005 scope statement.

The DNRôs stated grounds for proposing this proposed rule involve matters that occurred long after the 2005 scope statement was published and that are wholly unrelated to any federal directive such as CAMR. In the Notice of Public Hearing for this proposed rule, DNR states:

> ***The Department is proceeding with this rulemaking to address Governor Doyle's August 25, 2006, directive*** to the Department to develop a rule achieving a 90% reduction of mercury emissions from coal-fired power plants. In addition, these revisions respond to a January 22, 2007, Citizen Petition submitted to the Department of Natural Resources Board under provisions in s. 227.11(2)(a) and 227.12(1) and (2), Wis. Stat., and NR 2.05 Wis. Adm. Code. This petition requested that the Department and Board conduct rulemaking proceedings to revise and adopt rules that require a 90% to 95% reduction of mercury to the air from coal-fired electric generating units in the state by January 1, 2012. (Emphasis added.)

This proposed rule would also eliminate Wis. Admin. Code § NR 446.029, the DNR rule that had required the agency to initiate the 2005 rulemaking proceeding so as to render the mercury standards established in the 2004 Rule consistent with CAMR. The 2005 scope statement did not reference any plan to eliminate this rule. To the contrary, the 2005 scope statement was issued to effectuate § NR 446.029.

Because the substance, purpose and effect of this propose rule is wholly different than the substance, purpose and effect of the rulemaking announced in the 2005 scope statement, the latter document is not a valid or lawful scope statement for this rulemaking effort.

C. The Cascading Adverse Impacts on the Regulated Community, the Public and the Legislature of an Improper Scope Statement.

1. An Agency Must not Perform any Rulemaking Activity until a Scope Statement is Approved and Published. The scope statement is intended to provide elected officials, the regulated community, and an agencyôs governing body with advance notice of a proposed rulemaking process before agency staff commits to any particular regulatory scheme. The Wisconsin Legislature deemed publication of a proper scope statement so essential to the rulemaking process that Wis. Stat. § 227.135(2) bars state officials or employees from performing any activity in connection with a proposed rule, except for drafting the scope statement, until the individual or body with policy-making power over the subject matter of the proposed rule approves a scope statement. Such approval cannot occur until at least ten (10) days after the proposed scope statement is published in the Wisconsin Administrative Register. Wis. Stat. § 227.135(2) provides:

> Until the individual or body with policy-making powers over the subject matter of a proposed rule approves a statement of the scope of the proposed rule, ***a state employee or official may not perform any activity in connection with drafting the proposed rule except for an activity necessary to prepare the statement***. The individual or body with policy-making powers may not approve a statement until at least 10 days after publication of the statement in the register as required under sub. (3). If the individual or body with policy-making powers does not disapprove the statement within 30 days after the statement is presented to the individual or body, or by the 11th day after publication of the statement in the register, whichever is later, the statement is considered to be approved. (Emphasis added)

2. The Scope Statement Creates a Right to an Economic Impact Report. Publication of a proper scope statement is also important because it triggers various rights that can be exercised by Wisconsin citizens and members of the regulated community. For example, the Jobs Creation Act of 2003 (2003 Wis. Act. 118) enacted Wis. Stat. § 227.137, which gives Wisconsin citizens the right to petition the Wisconsin Department of Administration (ñDOAò) to direct a state agency to prepare an economic impact report

before the agencyôs proposed administrative rule is promulgated. Wis. Stat. § 227.137(2) provides:

> After an agency publishes a statement of the scope of a proposed rule under s. 227.135, and before the agency submits the proposed rule to the legislature for review under s. 227.19(2), a municipality, an association that represents a farm, labor, business, or professional group, or 5 or more persons that would be directly and uniquely affected by the proposed rule may submit a petition to the department of administration asking the secretary of administration to direct the agency to prepare an economic impact report for the proposed rule. The agency shall prepare an economic impact report before submitting the proposed rule to the legislature for review under s. 227.19(2) if the secretary of administration directs the agency to prepare that report.

The Secretary of DOA must order preparation of an economic impact report if a petition is filed within 90 days of the publication of a scope statement and certain other conditions are satisfied. Wis. Stat. § 227.137(2) provides:

> The secretary of administration shall direct the agency to prepare an economic impact report for the proposed rule before submitting the proposed rule to the legislature for review under s. 227.19(2) if the secretary determines that all of the following apply:
>
> (a)The petition was submitted to the department of administration no later than 90 days after the publication of the statement of the scope of the proposed rule under s. 227.135(3) or no later than 10 days after publication of the notice for a public hearing under s. 227.17, whichever is earlier.
>
> (b)The proposed rule would cost affected persons $20 million or more during each of the first 5 years after the ruleôs implementation to comply with the rule, or the rule would adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities.

The purpose of the economic impact report is to provide a detailed and comprehensive analysis of the impact of a proposed rule on specific businesses, business sectors, the stateôs economy, state governmental units and, obviously, the public before the proposed rule is promulgated. Moreover, the report is designed to inform and assist the Legislature as it conducts its legislative review of the rule pursuant to Wis. Stat. § 227.19. Wis. Stat. § 227.137(3) states:

> An economic impact report shall contain information on the effect of the proposed rule on specific businesses, business sectors, and the stateôs economy. When preparing the report, the agency shall solicit information and advice from the department of commerce, and from governmental

> units, associations, businesses, and individuals that may be affected by the proposed rule. . . . The economic impact report shall include all of the following:
>
> a. An analysis and quantification of the problem, including any risks to public health or the environment that the rule is attempting to address.
>
> b. An analysis and quantification of the economic impact of the rule, including costs reasonably expected to be incurred by the state, governmental units, associations, businesses, and affected individuals.
>
> c. An analysis of benefits of the rule, including how the rule reduces the risks and addresses the problem that the rule is intended to address.

The projected cost of the this proposed rule substantially exceeds the $20 million threshold for economic impact reports provided under Wis. Stat. § 227.137(2)(b). Further, this rule will adversely affect in a material way the economy, the utility and manufacturing sectors of the economy, productivity, competition, and jobs, as well as state, local or tribal governments or communities. By letter dated March 7, 2008, WMC exercised its right pursuant to Wis. Stat. § 227.137 and petitioned DOA to direct the DNR to prepare an economic impact report on this proposed rule.

By letter dated March 20, 2008, DOA denied the petition and refused to direct the DNR to prepare an economic impact report on the proposed rule. As justification for its denial and refusal to have an economic impact report completed, DOA claimed that the petition for the economic impact report was not submitted within 90 days after the publication of the 2005 scope statement. Therefore, according to DOA, WMCôs petition was untimely:

> Section 227.137(2), Wis. Stat., requires that a petition for an economic impact report be submitted no later than 90 days after the publication of the statement of scope of the proposed rule or no later than 10 days after publication of the notice for a public hearing, whichever is earlier. The scope statement for the proposed Chapter NR 446 revisions (AM-32-05) was published June 6, 2005. Your petition is dated March 7, 2008, well outside of the 90-day statutory timeline.

As noted extensively above, the 2005 scope statement is not a valid and lawful scope statement for this proposed rule for numerous reasons. Nevertheless, as feared and predicted in various communications to DNR, the inaccurate 2005 scope statement caused WMC and other interested parties to lose their rights to an economic impact report. Other rights were denied and obligations evaded as a result of this invalid scope statement.

3. <u>The Scope Statement Creates Rights and Obligations Relating to a DOA Report on this Proposed Rule</u>. Preparation of an economic impact report triggers additional processes designed to enhance the rule-making process. The Jobs Creation

Act also enacted Wis. Stat. § 227.138 to require the Department of Administration (DOA) to undertake a review of any proposed rule for which an economic impact report is prepared and publish an independent assessment of the proposed rule (the ñDOA Reportò). The Legislature intended DOA to undertake this independent analysis to balance the natural bias of promulgating agencies to broadly define their authority and overstate the need for, and understate the cost of, new regulatory programs. Pursuant to Wis. Stat. § 227.138(2), the DOAôs report must include all of the following findings:

> (a) That the economic impact report and the analysis required under s. 227.137(3) are supported by related documentation contained in the economic impact report.
>
> (b) That the agency has statutory authority to promulgate the proposed rule.
>
> (c) That the proposed rule, including any administrative requirements, is consistent with and not duplicative of other state rules or federal regulations.
>
> (d) That the agency has adequately documented the factual data and analytical methodologies that the agency used in support of the proposed rule and the related findings that support the regulatory approach that the agency chose for the proposed rule.

The DOA report is vital to this rulemaking process, and Wis. Stat. § 227.138(2) bars an agency from submitting a final draft rule to the Legislature until the DOA Report is approved by the DOA Secretary. In addition to providing the public with crucial information about the impact of the proposed rule, the economic impact report and the DOA Report (and additional information required by the Jobs Creation Act) are also designed to provide the Legislature with the information and analyses it needs to properly carry out its legislative review duties under Wis. Stat. § 227.19.

The above statutory rights and duties arise upon the publication of a proper scope statement. Conversely, these rights are lost and agency obligations are evaded if an agency fails to issue a scope statement in conformance with Wis. Stat. § 227.135. WMC and other trade and business organizations serve their members by, among other things, monitoring regulatory developments in Wisconsin by means of the issuance and publication of scope statements by agencies undertaking rulemaking proceedings. The regulated community regularly relies upon scope statements to identify rulemaking proceedings that may affect their members and to exercise rights that are triggered by the issuance of scope statements, including the right to petition for the preparation of an economic impact report pursuant to Wis. Stat. § 227.137.

4. <u>The Administrative Rulemaking Procedures are a Fundamental Obligation of an Agency</u>. The Wisconsin Legislature enacted these statutory requirements relating to promulgating rules to ensure that persons affected by a proposed rule have fair notice of the purpose, scope and fiscal impact of the proposed rule and the right to require that the agency prepare, disseminate and consider an analysis of the proposed rule before the rule

is finalized. The drafting instructions for these Jobs Creation Act provisions state that ñIt is well recognized that an agency notice must be sufficient to fairly apprise interested parties of the issues involved, so that they may present responsive data or argument relating thereto.ò[38] The lead legislative author of the Act goes on to quote a leading administrative law expert:

> *No court today would uphold a major agency rule that incorporates only a 'concise general statement of basis and purpose.' To have any reasonable prospect of obtaining judicial affirmation of the a rule, an agency must set forth the basis and purpose of the rule in a detailed statement, often several hundred pages long, in which the agency refers to the evidentiary basis for all factual predicates, explains its method of reasoning from factual predicates to the expected effect of the rule, relates the factual predicate and expected effect of the rule to each of the statutory goals or purposes that agency is required to further or to consider, responds to all major criticisms contained in the comments on its proposed rule, and explains why it has rejected at least some of the most plausible alternatives to the rule it has adopted. K. Davis, Administrative Law Treatise, sec. 7.4 at 310 (3d. ed. 1994)*

DNR offers nothing in the ñofficialò record that fairly apprises interested parties of its purpose and underlying rationale for the NOx and SO2 requirements. In turn, that prevents the regulated community from formulating meaningful comments on a key component of this rulemaking. Other procedural defects, including the lack of a proper scope statement, amount to a clear violation of the Chapter 227 administrative rulemaking provisions. WMC has never seen such an egregious disregard of the right of the regulated community to fair notice and a meaningful opportunity to comment on any rule. The fact that this rule will have such a significant impact on all businesses and homeowners across the state makes these shortfalls inexcusable.

IV. MISCELLANEOUS COMMENTS.

Miscellaneous Policy and Legal Considerations. The proposed rule raises several legal and policy issues that we deem of sufficient concern to note here.

- We believe this rule is a Type II action requiring an environmental assessment under NR 150. As such, DNR should prepare and EA for this rule, including an evaluation of ñthe economic advantages ***and disadvantages*** of the rule.ò See NR 150.22(2)(d). (emphasis added)
- NR 446.025 sets forth a mercury ambient concentration limit that is presumably designed to protect public health. DNR should explain why this level is no longer protective, why additional utility mercury limits are needed, and how the regulations in the proposed rule comport with

[38] October 20, 2003 email from Sen. Steppôs office to Gordon Malaise (LRB) with requested ñrevisionsò to LRB Chapter 227 draft, with such revisions set forth in an attachment to the emails; Attachment, pp. 2-3.)

§285.11(9), which directs DNR to adopt minimum standards for the emission of mercury compounds into the air.

- At this time WMC fails to see the merits of incorporating any state-only mercury rule into a federally enforceable SIP. The mercury regulations are not required by federal law, and there is no basis for including this rules in our SIP, especially in light of the fact that this rule will be trumped by federal law when the EPA promulgates a regulation under Section 112.

Wisconsin Utility Association. Although this rule has fatal legal and policy defects which should bar the agency from continuing with an unlawful rulemaking, WMC shares many of the concerns raised by the Wisconsin Utility Association, and supports a number of changes that would ultimately improve the draft mercury rule, which include the following.

DNR should ensure Consistency with Federal Mercury Regulation. Wisconsinôs energy customers will be best served by a state policy that ultimately allows for alignment with Federal mercury regulations for coal-fired electric generating units (EGUs); this is required under Wisconsin statutes. As noted above, any mercury rule must recognize the statutory requirement by including provisions that support transition to Federal mercury regulations when they are adopted.

The Rule should allow for Unrestricted Banking of Early Reductions. The proposed rule at NR 446.15 restricts use of early reduction credits (ERCs) to only ñ5% of the annual allowed emission total.ò Banking provisions support technology development and early emission reductions as well as provide for compliance flexibility and reduced costs. The ability to use 100 percent of banked mercury ERCs should be allowed for both small and large EGUs and all compliance options (mercury only or multi-emission approach).

DNR should expand Electric Reliability Waiver. Even with the multi-emissions option, the proposed rule accelerates the needed air pollution controls on compliance timeframes that are already difficult to achieve. While the proposed rule at NR 446.16 includes the option to request longer timelines through an ñelectric reliability waiverò under the multi-emission alternative, this request must be made within 24 months of the ruleôs effective date and no compliance extensions are allowed beyond January 1, 2017. This extension request should also be made available for the 90 percent mercury-only compliance option. In addition, the timeframe during which a utility may request an electric reliability waiver should not be restricted and an extension request should be allowed at any time as long as sufficient justification is available.

DNR should provide Provisions to Revise Emission Limitation Election. The proposed rules at NR 446.17(2) require that an emission limitation election must be made for coal-fired EGUs ñwithin 24-months of the effective date of this subchapter.ò These designations would then be used by the Department to establish permanent emission limitation requirements. Given the uncertainties of mercury control technology performance, the 24-month window in this provision is too short to make such a significant emissions planning decision. The proposed rule revision extends the decision timeframe to 48 months or, alternatively, provides the ability for a utility to request a revision of the election at any point as deemed necessary.

DNR did not make the Required Public Health & Welfare Finding. As required by Wis. Stats. 285.27 (2)(b), the DNRôs finding does not substantiate that the standard is needed to provide adequate protection for public health or welfare nor provide an analysis showing that failing to promulgate the proposed emission standard will cause population groups to be subjected to levels of mercury that are above recognized environmental health standards. Notably, the finding does not provide any documented connection between Wisconsin utility mercury emissions and mercury deposition in Wisconsin. Nor does the finding provide a credible risk analysis or explain how the proposed rule will reduce health risks to Wisconsin citizens.

DNRôs Costs Estimates are Inadequate. DNRôs estimates of cost of compliance are not valid because mercury control technology is still under development. Thus, the costs associated with the proposed emission limitation cannot be estimated at this time.

V. CONCLUSION.

WMC has numerous concerns over the substantive provisions of the proposed mercury rule, including the technical feasibility of the mandates and the regulatory costs to be borne by Wisconsin business and homeowner ratepayers. These concerns include:

- The 90 percent mercury emission requirement by 2015 is not shown to be technically feasible, creating electric system reliability issues and subjecting Wisconsin homeowners and business to extreme rate increases.
- Should utilities conclude that they can not adequately resolve the technical issues in a timely and prudent manner; as we should now assume, the alternative multi-pollutant compliance option becomes the *only* feasible compliance option.
- The NOx and SO2 mandates envisioned by the multi-pollutant option have fundamental policy defects, including the failure by DNR to show why these severe reductions are required. For example, given the fact the multi-pollutant option is not needed to address EPA air emission standards, mandating such reductions, in effect, imposes Wisconsin-specific ambient air quality emission limits more stringent than those set by EPA, contrary to Wisconsin law.

In addition, there are troubling process issues relating to this rule. In general, these procedural defects prevent any meaningful opportunity for the public to evaluate and comment on this proposal and are inconsistent with the administrative rulemaking process set forth in Chapter 227 of Wisconsin Statutes. We are also concerned that the objective of seeking Board approval of a final draft rule at the Natural Resources Board meeting in June does not allow for an adequate evaluation and response to comments -- especially for a rule of such extraordinary scope and economic impact as mercury regulation.

Finally, we see no merit in moving forward with a state-only mercury regulation that will be rendered unenforceable pursuant to §285.27(2)(d) when EPA regulates mercury under Section 112 as they have been directed to do by the D.C. Court of

Appeals. It makes no sense to force utilities to march down a state regulatory path that will change within the next few years by virtue of federal regulation. Rather, it would be much more sensible and cost effective to make near-term mercury reductions consistent with the federal CAMR, and thereby allow utilities the flexibility to meet federal MACT requirements after EPA finalizes a federal standard in response to the March 8, 2008 court ruling.

Thank you for your consideration of these comments. Please feel free to contact me if you have any questions.

Sincerely,

SCOTT MANLEY

Environmental Policy Director

Enclosures

WMC Mercury Comments
References (by Footnote Sequence)

1. BBC Research and Consulting, ñProjected Impacts on the Midwestern Economy of Beyond CAIR SO2 Reductions for Regional Haze,ò May 23, 2007.

2. Wisconsin Department of Natural Resources, *Air Matters*, April 2008. http://www.dnr.state.wi.us/air/pubinfo/airmatters/200804.html.

3. Berquist, Lee. ñOzone rules tightened by EPA; county still violates.ò Milwaukee Journal Sentinel, March 12, 2008. http://www.jsonline.com/story/index.aspx?id=727730

4. Seely, Ron. ñDane County's grade for particle pollution remains 'D' in annual air quality report.ò Wisconsin State Journal, May 2, 2008. http://www.madison.com/wsj/home/local/284322.

5. Berquist, Lee. ñSubpar area air expected for years.ò Milwaukee Journal Sentinel, March 20, 2008. http://www.jsonline.com/story/index.aspx?id=730604.

6. U.S. Environmental Protection Agency, Final State Designations for the 1997 PM2.5 Standard. For Wisconsin, ñentire state is attainment/unclassifiable.ò U.S. Environmental Protection agency, Washington, D.C. http://www.epa.gov/pmdesignations/regions/region5desig.htm.

7. Letter from Wisconsin Governor Doyle to EPA Region 5 Administrator Mary Gade regarding Designation of PM2.5 Nonattainment Areas in Wisconsin. December 18, 2007.

8. Wisconsin Department of Natural Resources, Kevin Kessler, Regional Air Quality Workshop. October 10, 2007. http://www.ladco.org/Oct%202007%20Workshop/Wisconsin.pdf. New Regional Modeling Results, Michael Koerber, Lake Michigan Air Directors Consortium, October 10, 2007. http://www.ladco.org/Oct%202007%20Workshop/Oct%2010%20Modeling%20Presentation.pdf.

9. Federal Register, Part II, Environmental Protection Agency, 40 CFR Parts 50 and 58.

10. Seely, Ron. ñDoyle: The airôs just fine,ò Wisconsin State Journal, March 1, 2008. http://www.madison.com/wsj/topstories/275159.

11. *Milwaukee Journal Sentinel* (editorial), ñFollow the law ï The state should abide by the federal Clean Air Act until the law changesò April 9, 2008.

12. Wisconsin Department of Natural Resources, ñWisconsin Regulations for Controlling Mercury Emissions from Electric Utilities,ò Bureau of Air Management ,February 2005

13. Electric Power Research Institute, *Integrated Approaches to Managing Mercury* (September 2006).

14. Wisconsin Utilitiesô Response to Citizensô Mercury Petition (June 2007).

15. Environmental Protection Agency, *Mercury Study Report to Congress, Volume III: Fate and Transport of Mercury in the Environment*, EPA-452/R-97-005 (1997) U.S. Environmental Protection Agency, Washington, D.C.

16. U.S. Environmental Protection Agency. (2005) Chapter 8, Regulatory Impact Analysis of the Clean Air Mercury Report. Report # EPA-452/R-05-003. U.S. Environmental Protection Agency, Washington, D.C.

17. Vijayaraghavan, K., K. Lohman, P. Karamchandani and C. Seigneur, 2002. Modeling Deposition of Atmospheric Mercury in Wisconsin, Report CP136-02-1 to the Electric Power Research Institute (EPRI), Palo Alto, CA.

18. Background memo from Secretary Hassett to the Natural Resources Board, March 6, 2007. http://dnr.wi.gov/air/pdf/March07greensheetbgrdmemoAM3205.pdf.

19. Presentation provided to the Natural Resources Board on August 15, 2007, at their meeting in Bayfield, Wisconsin. http://dnr.wi.gov/air/pdf/HgrulecommentsNRB0807.pdf.

20. DNR presentation to the Natural Resources Board on the Clean Air Mercury Rule - January 24, 2007. http://dnr.wi.gov/air/pdf/camrpres0701.pdf. Presentation to the Clean Air Act Task Force, December 15, 2006. http://dnr.wi.gov/air/pdf/hg1206caatf.pdf.

21. September 25, 2003 email from Sen. Steppôs office to Steve Miller (LRB) with ñattached proposalò including attached ñdocument describing the omnibus draft.ò pp. 11-14.

22. *Evaluation of the Compliance Implications to Wisconsin Electric Generators of Meeting the Wisconsin Proposed Mercury*: Prepared for Center for Energy and Economic Development, June 2007.